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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL

Respondent.

On Writ of Certiorari
To The South Carolina Supreme Court

BRIEF OF NUECES COUNTY, TEXAS; SCITUATE, MASSACHUSETTS CONSERVATION COMMISSION; CHATHAM, MASSACHUSETTS CONSERVATION COMMISSION; AMERICAN LITTORAL SOCIETY; CHESAPEAKE BAY FOUNDATION; COAST ALLIANCE; ENVIRONMENTAL DEFENSE FUND; NATIONAL AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; NATIONAL WILDLIFE FEDERATION; SOUTH CAROLINA WILDLIFE FEDERATION; DR. JOSEPH F. DONOGHUE; DR. PAUL T. GAYES; DR. JOSEPH T. KELLY; DR. ORRIN PILKEY; DR. RUTHERFORD H. PLATT AND DR. STAN RIGGS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Can economic harm to a property owner—standing alone—establish a violation of the Fifth Amendment, regardless of any other consideration, including whether the government regulation addresses private activity that harms other property owners and the general public?

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INTEREST OF AMICI

Amici are a coastal county in the State of Texas, two municipal conservation commissions in Massachusetts, six

national conservation groups, two regional conservation groups, and six leading coastal scientists. For the Court's convenience, a more detailed description of each amicus appears in the Appendix. Letters from counsel for the parties consenting to the filing of this brief have been filed with the Clerk.

Amici are interested in this case because they support reasonable governmental regulation to protect public safety, health and the environment. Adoption of petitioner's theory that economic harm to him, standing alone, is sufficient to establish a violation of the Fifth Amendment would severely frustrate amici's objectives. Petitioner's proposed test would impose an enormous burden on fiscally strapped federal, state, and local governments and deter them from taking actions necessary to protect the general welfare. It also would require the public, as a condition of protecting public safety, health and the environment, to pay property owners to halt harmful activity that, as a matter of constitutional law, as well as simple fairness and efficient social policy, they have no right to conduct. Protection of the public as a whole would be severely and unjustly threatened if compensation had to be paid to individuals who engage in activities that cause harm to the public.

STATEMENT OF THE CASE

Amici rely on the statement of the case presented by respondent South Carolina Coastal Council.

SUMMARY OF ARGUMENT AND INTRODUCTION

Amici are submitting this brief in support of respondent for two purposes.[1] Our first purpose is to provide the Court

[1] Amici agree with the position of respondent, supported by the United States, that this case is not ripe because petitioner failed to pursue the additional administrative remedies available to him under the 1990 amendments to the Beachfront Management Act. Amici do not specifically address this issue because other briefs filed with the Court address it fully. If the Court agrees to remand the case to permit petitioner to exhaust his administrative remedies, it will of course be unnecessary for the Court to address the merits of the case at this time.

detailed information about the serious erosion and storm damage problems occurring on the nation's barrier islands and in South Carolina in particular. This information is intended to help the Court evaluate the threats to public safety and health and to private property associated with coastal development that led the South Carolina Legislature to adopt the coastal setback requirement in the 1988 Beachfront Management Act.

Our second purpose is to set forth the legal standards amici believe should govern the resolution of this and similar Fifth Amendment challenges to public safety, health, and environmental regulations. The Court should reject petitioner's theory, supported by certain other amici, that he is entitled to compensation based solely on a showing that he was denied "economic use" of his property. That theory contradicts the Court's frequent recognition, in a variety of regulatory contexts, that government action may not constitute a taking when it substantially reduces or even eliminates the value of private property. The proposed test of "economic viability" would produce arbitrary and irrational results inconsistent with the Fifth Amendment's basic goals of justice and fairness. It also would be difficult to apply in practice and therefore would neither clarify nor increase the predictability of the Court's "takings" analysis.

We submit that the standards the Court should apply in this and similar cases are rooted in the well-established doctrine that government may properly act to prevent a citizen from using his property in a way that injures his neighbors or the general public. Contrary to the position of the United States, common law nuisance doctrine neither explains nor limits the authority of government to act without paying compensation under the Fifth Amendment. So long as a government regulation is actually related to the prevention of a significant public harm, there is no violation of the Fifth Amendment.

Amici contend that the Court should affirm the decision of the South Carolina Supreme Court on the ground that

the court properly concluded that petitioner failed to carry his burden of demonstrating a taking in this case. At a minimum, petitioner had the duty to address not only the economic harm to him but also the public purposes of the Beachfront Management Act. Petitioner failed—indeed did not even attempt—to shoulder the necessary burden.

ARGUMENT

I. THE SOUTH CAROLINA SETBACK LAW IS A REASONABLE LEGISLATIVE RESPONSE TO THE SERIOUS PUBLIC HARMS CAUSED BY COASTAL DEVELOPMENT IMMEDIATELY ADJACENT TO AN ERODING OCEAN SHORELINE.

> "Everyone who hears these words of mine and does not put them into practice is like a foolish man who built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash." *Matthew* 7:26-27.

A. Development on Eroding Ocean Shorelines Creates Serious Threats to Public Safety and Health and to Private Property.

The barrier islands along the Atlantic shore from New Jersey to Florida, including the Isle of Palms, are among the most dynamic, unpredictable, and dangerous features of the nation's landscape. Located at the interface of land and sea, barrier islands are low lying, flood prone, and typically underlain by easily eroded, unconsolidated sediments. Contrary to ordinary intuition that dry land does not move, barrier islands rapidly change form, migrating both laterally and landward. As barrier islands move, the dunes behind the beach are constantly being reshaped and relocated. The driving forces in this process are the steady pounding of wind and waves, punctuated by the often dramatic impact of hurricanes and other major storms.

As the U.S. Congress found in passing the Coastal Barrier Resources Act of 1982, 16 U.S.C. § 3501 *et seq.*:

> Coastal barriers [islands] are among the most unstable land forms. Beaches, dunes, and entire islands erode and migrate as ocean currents, wind, and waves undermine and move them. Storms can wipe out whole sections of beach when they are overwashed and can just as easily close inlets as sediments are redeposited. The sands of the beaches continuously move and are redistributed.

S. Rep. No. 419, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3212, 3213.

The dynamic nature of coastal processes has become even more volatile and threatening in recent history as a result of an increase in the rate of sea level rise. *See id.* Over the last one hundred years, the sea level along the Atlantic has risen by approximately one foot.[2] While there is no scientific consensus on the causes of this trend, authorities generally predict that sea level will rise at an even faster rate over the next century.[3] Continued rapid rise in sea level will put even greater pressure on coastal barrier islands in the future.[4]

The dynamic and migrating nature of barrier islands is well-illustrated by petitioner's property itself. Data presented by the South Carolina Coastal Council at trial showed that there have been substantial shifts in the shoreline in the vicinity of petitioner's property and that the sea has inundated his property many times, often for long periods. In roughly half of the last forty years, all or part

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[2] S.D. Hicks, *Sea Level Variation for the United States 1855-1980* (National Ocean Service 1983).

[3] A recent report by the National Research Council concluded that "one hundred years from now, it is likely that sea level will be 0.5 to 1.0 meter (1.6 to 3.3 feet) higher than it is at present." National Research Council, *Sea Level Change* (1990).

[4] It is predicted that a one-foot rise in sea level will translate into a 100 to 200 foot retreat along the South Carolina shore. Kana, "The Physical Impact of Sea Level Rise in the Area of Charleston, South Carolina," in *Greenhouse Effect and Sea Level Rise* (M.C. Barth & J. Titus eds. 1984).

of petitioner's property was part of the beach or even flooded twice daily by the ebb and flow of the tide. Tr. at 84. Between 1957 and 1963, the shoreline was entirely landward of, *i.e.*, behind, petitioner's property. Tr. at 79, 81-82. Between 1963 and 1973, the shoreline was 100 to 150 feet landward of petitioner's property. *Id.* In 1973, the first line of stable vegetation was about halfway through the property. Tr. at 80.

Furthermore, the shoreline in front of petitioner's property may well move landward again and completely inundate petitioner's property once more. Tr. at 81. While the beach along this stretch of coast has been generally "accretional" since 1973, the evidence shows that the beach remains at substantial risk from erosion. Specifically, the general pattern of erosion is subject to potentially lengthy as well as dramatic reverses as migrating offshore shoals move toward the land and become attached to the shore. Tr. at 73. The property is in an inlet erosion zone and such areas are particularly prone to erosion as a result of storm surges, tidal currents, and ebb surge.[5]

The forceful action of waves, currents, and wind, abetted by the long-term rise in sea level, has made coastal erosion a serious national problem. As a recent Federal Emergency Management Agency report documented:

> From California to the Great Lakes to Cape Cod, houses built along the immediate coastline are often destroyed by a combination of caving of bluffs or erosion of beaches and dunes and flooding. Combined erosion and flooding affects all coasts but is particularly serious on barrier islands and on exposed Atlantic and Gulf Coasts and the Great Lakes. In 1971, the U.S. Army Corps of Engineers estimated that a

[5] U.S. Dep't of the Interior, *Report of the Barrier Island Work Group* 14 (1987). "Inlet shorelines move about 10 to 100 times faster than nearby oceanfront property lines." University of North Carolina Sea Grant, *Your Place at the Beach* 1 (1987).

> quarter of the national shore front (20,500 miles) was subject to significant erosion.[6]

The unprecedented growth in the nation's coastal population only increases the threat posed by erosion. About 110 million people—almost half of the nation's population—live along the coast. The Commerce Department estimates that by the year 2010, the coastal population will have grown to more than 127 million.[7]

Erosion and storms have inflicted enormous damage on the nation's coastal areas. Over the last 50 years, the Atlantic coast has faced a series of major hurricanes, resulting in over 900 deaths.[8] Erosion and storms have destroyed thousands of homes and caused billions of dollars worth of property damage. Hurricane Hugo alone, which hit South Carolina particularly hard in 1989, resulted in fifty-one deaths and $10 billion in damage.[9]

The dramatic impacts of storms on barrier islands are illustrated by the effects of Hurricane Hugo on the Isle of Palms, the site of petitioner's property. At the height of the storm, the entire Isle of Palms was completely

[6] Federal Emergency Management Agency, *Reducing Losses in High Risk Flood Hazard Areas: A Guidebook for Local Officials* F-1 (Feb. 1987). *See also* Lemonick, "Shrinking Shores: Overdevelopment Poor Planning and Nature Take Their Toll," *Time*, Aug. 10, 1987, at 38. "In the U.S. entire coastal areas are disappearing into the sea. Virtually every mile of shoreline is affected in every state that borders an ocean, as well as those on the five Great Lakes, where large chunks of waterfront property have been lost or damaged due to record-high water levels in recent years."

[7] National Oceanic and Atmospheric Admin., U.S. Dep't of Commerce, *50 Years of Population Change Along the Nation's Coasts 1960-2010*, 1 (April 1990).

[8] Federal Emergency Management Agency, *Principal Threats Facing Communities and Local Management Coordinators, A Report to the United States Senate Committee on Appropriations* 26 (April 5, 1990).

[9] *Id.* at 25.

flooded.[10] The waves and accompanying tidal surge created by the hurricane caused extensive damage to houses located along the beachfront.[11] Generally, everything on the island within 500 feet of the water—which includes petitioner's property—was either severely damaged or completely destroyed.[12]

The hazards of building in erosion areas go far beyond the obvious risks to individuals who face destruction of their dwellings and threats to their safety. Shorefront development that destroys sand dunes or otherwise disrupts the natural movement of the beach/dune system weakens the most effective defense for inland areas from storm surges. In their natural state, sand dunes act as a reservoir of sand to replace beach sand lost to the forces of ocean waves and storms and offer a protective barrier for inland properties against storm surges and winds.[13] Dunes gradually migrate in response to the changing configuration of the shore. Construction in or adjacent to the beach/dune system disrupts the dynamic equilibrium and long-term stability of the dune, drastically impeding its functions of beach replenishment and storm protection.[14]

The value of dunes as a defense against storms is well-illustrated by South Carolina's experience during Hurricane Hugo. Where dunes, rather than houses, were available to absorb the impact of waves and storm surge, damage to structures was much less than where dunes

[10] Katuna, "The Effects of Hurricane Hugo on Isle of Palms, South Carolina: From Destruction to Recovery," 8 *J. of Coastal Res.* 263-64 (Special Issue Spring 1991).

[11] *Id.*; Saffir, "Hurricane Hugo and Implications for Design Professionals and Code-Writing Authorities," 8 *J. of Coastal Res.* 25, 27 (Special Issue Spring 1991).

[12] Saffir, *supra* note 11, at 27.

[13] J. Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources* 320-22, 94-95, 97-98 (1977).

[14] *Id.*

were not present.[15] Eighty-four percent of all buildings completely destroyed or removed from their foundations during the hurricane were fronted by a combination of narrow beaches and narrow dunes.[16]

Structures built on the ocean shore also create a substantial danger to landward structures and their occupants. For example, during Hurricanes Kate and Hugo, debris from exposed first-tier properties damaged a number of houses further inland.[17] In one case a roof was blown some 1000 feet inland. This "projectile damage" from the first two rows of structures is the greatest source of debris that causes damage to inland structures.[18]

A similar type of damage occurs when high waters literally lift exposed structures off their foundations and drive them back toward land. During Hurricanes Kate and Hugo, the storm surge lifted houses and moved them across streets, lagoons and sounds, sometimes as far as a mile or more.[19] During Hurricane Bob which hit the East Coast this past summer, many buildings in Massachusetts were washed off their foundations and caused extensive damage to landward and abutting buildings.[20]

Storm debris from damaged coastal structures also impedes the rescue and relief efforts of public emergency

[15] Thieler, "Quantitative Evaluation of Coastal Geomorphological Changes in South Carolina After Hurricane Hugo," 8 *J. of Coastal Res.* 187 (Special Issue Spring 1991); Stauble, "Effects of Hurricane Hugo on the South Carolina Coast," 8 *J. of Coastal Res.* 129 (Special Issue Spring 1991).

[16] Thieler, *supra* note 15, at 199.

[17] R. Clark, *Hurricane Kate. Poststorm Report No. 86-1*, 105 (Prepared for the Florida Department of Natural Resources) (1986); Coch, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina," 8 *J. of Coastal Res.* 201, 213-14 (Special Issue Spring 1991).

[18] *See* Coch, *supra* note 17.

[19] R. Clark, *supra* note 17, at 92; Katuna, *supra* note 10, at 265.

[20] *National Flood Insurance Mitigation and Erosion Management Act of 1991: Hearing before the Senate Subcommittee on Housing and Urban Affairs* 5-6 (Sept. 25, 1991) (testimony of James O'Connell, Coastal Geologist for the Massachusetts Coastal Zone Management Program).

services. Storm debris must be removed before relief can even reach some areas. In South Carolina, after Hurricane Hugo, clearing of roads for emergency vehicles took up to two weeks.[21] Storm debris can also create a problem seaward. As stated by Dr. Gayes of the University of South Carolina-Coastal Carolina College: "The presence of extensive hurricane related debris in the shallow waters off the coast poses a threat to the economy and public safety of the state."[22]

Another public danger arises from the threat to public health from pollution. Storm events commonly raise the water table on barrier islands, leading to failure of septic systems and community-wide wastewater systems.[23] Development along the Massachusetts coast affected by Hurricane Bob, for example, created serious public health problems:

> Field observations revealed that structures which were destroyed or carried off foundations, particularly on barrier beaches, deposited all the typical household chemicals and storage shed contents (drain cleaners, old petrochemicals, lawn fertilizer, paints, etc.), as well as septic system contents, into landward salt ponds. As a result, all shellfish beds and many swimming beaches were immediately closed, some indefinitely, in affected areas.[24]

Finally, development on the ocean is costly to the general public not only in terms of human life and property damage, but also as a severe drain on the public fisc. For example, the federal government's costs associated with

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[21] Dowd, "Debris Removal and Channel Shoaling," in *Hurricane Hugo One Year Later* 104 (B. Sill and P. Sparks eds. 1990).

[22] *Id.* at 107.

[23] Cook, "Hurricane Hugo vs. Critical Lifelines: Lessons Learned and Implications for the Future," in *Hurricane Hugo One Year Later*, *supra* note 21, at 76.

[24] Testimony of James O'Connell, *supra* note 20, at 6.

Hurricane Hugo, represented by disaster relief and federal flood insurance payments, amounted to nearly $2 billion ($1.6 billion for disaster relief; $364 million for flood insurance payments).[25] Approximately $750 million of this was for South Carolina.[26]

B. The South Carolina Setback Requirement is a Balanced and Prudent Response to the Serious Threats of Public Harm from Coastal Development.

The South Carolina coastal program, like that of 28 other coastal states and territories, is carried out pursuant to the Federal Coastal Zone Management program, a "federal-state partnership" designed to provide comprehensive management of our nation's coastline. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (CZMA), sets out national objectives and guidelines and also provides funding and other incentives for the development of state coastal programs.

One of the primary goals of the CZMA is discouraging development in hazardous, erosion-prone areas immediately adjacent to the ocean shore. The CZMA, as amended in 1980, directs the National Oceanic and Atmospheric Administration (NOAA) to ensure that state coastal programs "provide for . . . the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm-surge, geological hazard and erosion-prone areas . . . and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B). The House Report on these amendments specifically states that one appropriate state policy for barrier islands is "requiring all development to be a certain distance from the beach in order to allow the island to pro-

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[25] U.S. General Accounting Office, *Report to Congressional Requesters. Disaster Assistance: Federal, State, and Local Responses to Natural Disasters Need Improvement* 13 (GAO/RCED-91-43) (1991).

[26] *Id.*

vide its natural storm protective function." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 43 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362, 4387.

The federal policy of encouraging state setback requirements was reinforced by 1990 amendments to the CZMA calling upon the states to address the substantial, continuing rise in sea level. The 1990 amendments made stopping development in high-hazard areas a top priority for state coastal programs. 16 U.S.C. § 1458(a)(2). Fourteen states participating in the federal coastal zone program have now adopted beach setback laws.[27]

In response to the requirements of the CZMA, as well as to substantial public concern over the problems associated with coastal development, the South Carolina Coastal Council in 1986 established a Blue Ribbon Committee on Beachfront Management to assess the extent of the State's erosion problems and to determine how the State's beaches and dunes should be managed in the future. The Committee's March 1987 report found, among other things, that:

1. The South Carolina beach/dune system was in a state of crisis. Over 57 miles of beach, out of a total of 198 miles of Atlantic Ocean shoreline, were critically eroding.[28]

2. This erosion was threatening the continued existence of the beach/dune system and thereby threatening life and property.[29]

3. The primary causes of this crisis included a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system and a lack of comprehensive beach management planning.[30]

[27] The States with setback requirements are: Alabama, Delaware, Florida, Hawaii, Maine, Maryland, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Wisconsin. *See generally* Hwang, "Shoreline Setback Regulations and the Takings Analysis," 13 *U. Haw. L. Rev.* 1 (1991).

[28] *Report of the South Carolina Blue Ribbon Committee on Beachfront Management* i (March 1987).

[29] *Id.*

4. The beach-dune system "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability;" "uncontrolled and unwise development sited too close to the beach/dune system has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property."[31]

5. The Coastal Council's limited authority over the beach/dune system meant that the "Council has been unable to prevent structures from being sited unwisely close to the eroding beach and the impact area of storms and high tides."[32]

6. "A relatively minor storm in early December, 1986, closely followed by another storm on January 1, 1987, inflicted substantial damage to upland property ($20 million) and left the coast of South Carolina severely damaged and highly vulnerable to future storms."[33]

7. A retreat from the beach over a thirty year transition period, by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the beach/dune system to retreat from the beach/dune system, is the only practical approach to the State's coastal erosion problems.[34]

The South Carolina Legislature enacted the 1988 Beachfront Management Act to address the findings and implement the recommendations of the Blue Ribbon Committee. The Act establishes a "comprehensive, long-range beach management plan" to accomplish "a gradual retreat [of development] from the [beach/dune] system over a forty year period," S.C. Code Ann. § 48-39-260(2), extending by

[30] *Id.*

[31] *Id.* at 1, 2.

[32] *Id.* at ii.

[33] *Id.* at iii.

[34] *Id.* at iv, 2.

ten years the thirty year retreat policy advocated by the Committee.[35] The 1988 Act was approved by the Secretary of Commerce, through NOAA, as consistent with the CZMA.[36]

The Act reflected a careful balance between the need to address the problems of coastal erosion and respect for the interests of coastal property owners. Recognizing that owners of existing residences have a substantial expectation in the continued use of their property, the Act did not contemplate the immediate relocation or removal of these structures, despite the hazard they present to the general public. Rather, the Act provided only that when a habitable structure has been "destroyed beyond repair due to natural causes," the structure could not be rebuilt seaward of the setback line established by the Act. S.C. Code Ann. § 48-39-290(B)(1)(b).

The Act provided for more stringent regulation of new development. As applied to petitioner's property, the Act required that a "baseline" be set at the most landward point of erosion during the past forty years, recognizing that, at least in absence of any better information, the historical record over the last forty years provided the best available basis for predicting erosion likely to occur over the next forty years. S.C. Code Ann. § 48-39-280(A)(2). Then, in order to implement the stated policy of retreat, the Act directed that a "setback line" be established behind the baseline, calculated "at a distance which is forty times the average annual erosion rate," but "no less than twenty feet from the baseline." S.C. Code Ann. § 48-39-280(B). Habitable structures could not be built seaward of the setback line.

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[35] While the Legislature recited various different governmental objectives served by the Act, S.C. Code Ann. § 48-39-250(1), it is clear from the history of the Act as well as the methodology for setting the baseline and setback line that the predominant purpose of the Act is to "protect life and property" by minimizing storm and erosion damage. S.C. Code Ann. § 48-39-250(1)(a).

[36] 54 Fed. Reg. 7,580 (1989).

The Legislature also recognized that, in particular circumstances, this general method for identifying those areas of actual risk might not be either correct or fair. Thus, the Act provided that the baseline (and in turn the setback line) could be set at a different point whenever available data "indicate[d] that the shoreline is unlikely to return to its former position." S.C. Code Ann. § 48-39-280(A)(2). Despite the fact that petitioner attempted to belittle the harm-protection purpose of the Act by arguing that his property was more than a "football" field from the active beach, there is no indication that petitioner ever suggested to the Council that the baseline for his property should be set at a different point. Specifically, he never sought to invoke the provision of the Act that allowed him to challenge the drawing of the baseline. S.C. Code Ann. § 48-39-280(E).

II. ECONOMIC HARM, STANDING ALONE, IS NOT SUFFICIENT TO DEMONSTRATE A VIOLATION OF THE FIFTH AMENDMENT.

Petitioner's theory at trial was that a showing of economic harm to him was sufficient to demonstrate a violation of the Fifth Amendment.[37] However, the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978). Petitioner's theory, which was adopted by no member of the divided South Carolina Supreme Court, is flatly inconsistent with a common sense understanding of government's overriding responsibility to protect citizens from risks to their safety and other harms.

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[37] For example, during the trial when counsel for the Coastal Council attempted to explain the public harms caused by coastal development and how the Act addresses these harms, counsel for petitioner objected that evidence of the purpose of the Act was irrelevant to his client's claims for damages: "[I]f he's trying to show a basis for why they passed the Act, we haven't raised an issue with the Act. We haven't raised an issue as to its validity; only the price tag associated with it." Tr. at 95.

A. There is No Support for the Proposed *Per Se* Rule.

The brief of the United States ably describes a wide variety of government actions that substantially reduce or destroy property values without creating a right to compensation under the Fifth Amendment. Brief of the United States, at 13-15; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.14 (1987) (collecting cases). Recently, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court reviewed a floodplain ordinance that allegedly deprived the owner of "all use" of his property. The Court implicitly rejected the proposition that this allegation by itself could establish a violation of the Fifth Amendment, because it remanded the case for consideration of whether, even if the ordinance denied the owner all use, the ordinance could be justified as a safety measure. *Id.* at 312.

The Court has found adverse financial effect on a property owner insufficient to demonstrate a "taking" in a variety of regulatory contexts. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court concluded that if the Environmental Protection Agency disclosed confidential commercial data submitted by a manufacturer, the company would be completely deprived of its property interest in its trade secrets. Nonetheless, the Court found no taking because the company had no "reasonable expectation" that its property interest in the confidentiality of its trade secrets would be protected. *Id.* at 1006. Similarly, in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), the Court recognized that Federal legislation imposing a new liability on an employer seeking to withdraw from a pension fund "completely deprives [the] employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." Nevertheless, the Court rejected the claim that the legislation effected an unconstitutional taking. *Id.*

Even in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which represents perhaps the Court's most searching examination of a government regulation under the Fifth

Amendment, the Court did not hold that the impact of a regulation on a landowner is the only relevant factor. The Court's conclusion in that case—"that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights," *id.* at 414,—demonstrates that the purpose of the regulation, as well as its financial impact, is relevant in takings analysis.

Apart from the force of precedent, petitioner's proposed *per se* rule is nonsensical. According to petitioner's view, the governmental purpose of a regulation would be a potentially dispositive factor only so long as the property owner retains some use of the property, but it would become irrelevant if the regulation causes the property to lose "all value." This approach would lead to totally arbitrary results based on minute differences in the economic effect of regulations on different property owners. *Compare* Brief *Amicus Curiae* of Institute for Justice at 11-13.

Contrary to the position of certain other amici, a regulatory action, even if it denies an owner "economic use" of his property, is hardly equivalent to an actual physical invasion of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (permanent, physical occupation of property is *per se* a taking). As the Court emphasized in *Loretto*, physical invasions are "special," *id.* at 432, and represent "the most serious form of invasion of an owner's property interests" insofar as they effectively destroy every strand in the bundle of property rights. *Id.* at 435. That is clearly not the result in this case or in governmental regulatory actions generally. Petitioner retains the right to exclude others from the property—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *see also Keystone*, 480 U.S. at 488 n.18. Furthermore, the evidence showed that the Act by no means deprived petitioner of all use of his property but rather allowed him to place a temporary trailer, a tent or a walkway on the

property. *Compare Hall v. Board of Envtl. Protection*, 528 A.2d 453 (Me. 1987) (denial of permit to construct on an ocean dune not a taking where owner permitted to place motorized trailer on property).

Petitioner and several amici are also incorrect when they suggest that *Agins v. City of Tiburon*, 447 U.S. 255 (1980), established that a property owner is automatically entitled to compensation if a regulation denies economically viable use of property. The *Agins* decision itself demonstrates that economic impact is not the only relevant factor. For example, the Court said that "no precise rule determines when property has been taken," but rather "the question necessarily requires a weighing of public and private interests." *Id.* at 260-61. *See also id.* at 262 (the "benefits must be considered along with any diminution in market value that the appellants might suffer"). In no other case has the Court read *Agins* as establishing a *per se* test and the Court has never declared a government regulation unconstitutional based on that standard.[38] Finally, less than a year before its *Agins* decision the Court first articulated the three-factors which have provided the framework for the Court's takings analysis to the present day. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central*, 438 U.S. at 124-28. It is literally unbelievable that the Court, in its rather short, unanimous *Agins* decision, would have adopted a new, independent test for takings analysis without saying so.

Lastly, apart from the substantive reasons for rejecting petitioner's proposed test, a *per se* rule based on "economic viability" offers none of the advantages that favored

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[38] To be sure, the Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to *defeat* a facial takings challenge. *See Hodel v. Indiana*, 452 U.S. 314, 335 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration.

adoption of a *per se* rule for permanent, physical occupations of property. The Court concluded in *Loretto* that a *per se* rule for permanent, physical invasions avoided "otherwise difficult line drawing problems" and involved "relatively few problems of proof." 458 U.S. at 436-37. By contrast, the proposed economic viability test would require detailed evaluations of claims based on the amount and timing of the owner's investment in property and the uses to which the property is or might be put. Complex factual issues would be presented concerning whether a particular enterprise is or is not profitable, and to what degree its asserted lack of profitability is attributable to government regulation or to any of a myriad of other likely causes.

B. The Proposed Rule Would Contradict the Authority of Government to Regulate Property Use to Prevent Harm to Other Property Owners and the General Public.

In addition to lacking any affirmative support, the proposed *per se* rule should be rejected because it is inconsistent with the recognized authority of government, without paying compensation, to prevent property owners from using their property in a fashion that harms other property owners or the general public. "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). Since no individual has a right to use his property in a way that harms others, the government has not taken anything when it asserts its power to prevent public harms. *See Keystone*, 480 U.S. at 491 n.20.

The principle that property ownership is limited by the rights of other landowners and the public at large is inherent in the very concept of property. In *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851), the Massachusetts Supreme Court stated:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder

> of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

See also Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846).

The Court has repeatedly upheld harm-prevention regulations against attack under the Fifth Amendment, regardless of the magnitude of the landowner's economic loss. In *Mugler*, 123 U.S. at 657, the Court rejected a Fifth Amendment challenge by the owner of a Kansas brewery to a prohibition against the manufacture of beer even though it rendered the property of "little value." In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court held that the Fifth Amendment did not require the State of Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962), the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety even on the assumption that it "would confiscate the entire remaining utility of [the] properties." *See also Andrus v. Allard*, 444 U.S. 51 (1979) (upholding prohibition against selling artifacts made with feathers from endangered birds in order to protect endangered wildlife).

The Brief of the United States contains numerous other examples in which government authority to diminish or destroy property values in order to prevent public harms

has been upheld. These include destruction of "unwholesome food," condemnation of an unsafe building, or disposal of diseased poultry. Brief of the United States at 14 & n.3.

Contrary to the suggestion of the United States, however, government authority to prevent public harms, even if it diminishes or destroys property values, is not limited to these archaic examples. *See Keystone*, 480 U.S. at 488, citing *Block v. Hirsh*, 256 U.S. 135, 155 (1921). When the government imposes new air pollution regulations, an entire factory may have to shut down. Although not faced with a taking challenge, this Court in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), did not hesitate to reject a claim that economic hardship justified an exemption from water pollution regulations. Likewise, new regulations for solid waste have led to the closure of many existing landfills.[39] While no one doubts the seriousness of the economic hardship these types of regulations impose, it cannot plausibly be asserted that compensation is due those whose activities are determined, based on available scientific and environmental information, to threaten the nation's well being.

While government regulations commonly proscribe particular activities to prevent public harm, the logic of the Court's decisions applies equally when, as in this case, the harm arises from use of land for any permanent development. This is confirmed by the Court's decision in *First English*, where the Court remanded the case to the lower courts to consider whether an ordinance prohibiting any permanent structures in a floodplain was a valid safety ordinance. *See id.*, 482 U.S. at 325-26 (Stevens, J., dissenting on other grounds) ("[I]n order to protect the health and safety of the community, government . . . surely may [without paying compensation] restrict access to hazardous areas—for example, land on which radioactive materials have been discharged, land in the path of a lava flow from

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[39] Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Wastes* 3 (OTA-0-424) (1989).

an erupting volcano, or land in the path of a life-threatening flood."); Brief of the United States at 14 (recognizing authority of government without paying compensation to prohibit "siting a residence or other building on a steep slope or other unsafe location").

The rule that a person cannot use his property to harm others furthers efficient public policy and is rooted in fundamental principles of fairness. Restricting private activity that imposes external costs on other property owners or the community at large generally yields an efficient result. And when a person uses his private property for his benefit in a way that harms the community it is far more fair to require the owner to cease his offending activity than to force the public to choose between allowing the activity to continue or paying the owner to cease.

III. GOVERNMENT AUTHORITY TO PROTECT THE PUBLIC FROM HARM WITHOUT PAYING COMPENSATION IS NOT LIMITED BY COMMON LAW NUISANCE RULES.

While the United States and certain other amici acknowledge that property owners have no constitutionally protected right to use their property to harm others, they argue that this principle should be confined to a narrow "nuisance exception." The United States contends that this "exception" must not "depart from the common law origins of nuisance" and that it can only be invoked for "an established nuisance-prevention or public health and safety purpose, in terms of the nature, degree, proximity and context of the harm concerned." Brief of the United States at 13, 17.

The United States is wrong, first, in suggesting that the character or purpose of a governmental regulation constitutes some type of "exception" or defense in takings cases. The character or purpose of a governmental regulation is an essential consideration in determining whether property has been taken in the first place. *See, e.g., Keystone*, 480 U.S. at 488-89; *Kaiser Aetna*, 444 U.S. at 175. As the Court stated in *Keystone*, citing *Mugler* and similar

precedents, "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required." 480 U.S. at 488.

More importantly, contrary to the position of the United States, the scope of government authority to prevent public harms should not be defined by reference to the common law of nuisance. Indeed, the Court already has explicitly rejected the contention that government power to act without paying compensation depends on whether the prohibited activity is a common law nuisance. *See Goldblatt*, 369 U.S. at 593; *Miller v. Schoene*, 276 U.S. at 280. The Court has repeatedly upheld regulations designed to prevent public harms that would not be deemed nuisances at common law. *See, e.g., Mugler* (operation of brewery); *Andrus v. Allard* (sale of endangered species artifacts). State courts have reached the same result. *See, e.g., Durham v. Cotton Mills*, 141 N.C. 615 (1906) (rejecting nuisance claim against industrial polluter because of insufficient evidence of injury to meet common law standard of proof, but upholding under the Fifth Amendment statutory prohibition against the pollution); *State v. Wheeler*, 44 N.J. Law 88, 91-92 (1882) (anti-pollution requirement is not a taking despite lack of proof of injury because "[s]uch acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim "sic utere tuo, ut alienum non laedas' ").[40]

This conclusion is entirely consistent with the language and history of the Fifth Amendment. The takings clause was included in the Bill of Rights to address concerns about actual physical appropriations of private property,[41] and the Court did not even hold that a regulatory action could constitute a taking in violation of the Fifth Amendment until 1922. *See Pennsylvania Coal v. Mahon*. Thus,

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[40] "Use your own property in such a manner as not to injure that of another."

[41] *See* Note, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 *Yale L. J.* 694 (1985).

it is questionable whether the drafters even intended for the Fifth Amendment to reach purely regulatory activities. In any event, we are aware of no evidence, and the United States certainly offers none, that the drafters believed that the common law of nuisance should guide the Court's application of the Fifth Amendment.

Apart from precedent and history, reliance on the common law of nuisance as a guide is not a practical approach. First, grafting the common law of nuisance onto the Fifth Amendment would make takings analysis, an already opaque field of the law, even murkier. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W.L. Prosser, *Law of Torts* 571 (1971). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981).

Furthermore, while the United States states that government regulation must not depart from "common law origins," the examples provided by the United States contradict this requirement. On the one hand, the United States argues that the government may properly regulate the manufacture and distribution of drugs, despite the fact that modern government regulation of drugs has little if any connection to the law of nuisance. On the other hand, the United States contends that protection of the "natural environment" would fall outside the scope of its proposed "nuisance exception" even though nuisance law provided the original basis for legal actions to prevent harm to the environment. *See, e.g., New York v. New Jersey*, 256 U.S. 296 (1921) (nuisance action to prevent water pollution); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (nuisance action to prevent air pollution); *see generally* Blackstone, *Commentary on the Laws of England* 218 (nuisance includes "to corrupt or poison a watercourse"). The United States' selective application of the law of nuisance is based less on fundamentals of legal doctrine than on a simple

listing of those types of regulations the United States believes, as a matter of policy, should or should not be enforced without a requirement of compensation.

Furthermore, the strict causation requirements of nuisance law would be a totally inappropriate limitation on the authority of the government to prevent public harms. For example, a variety of chemical substances produced in this country are known to cause cancer. However, linking a particular individual's illness to one of several potential chemical agents and to a particular manufacturer is nearly impossible under traditional requirements for proof of causation.[42] Similarly, it is well established that filling wetlands in a floodplain increases floodpeaks and increases the risk of injury to people and property downstream.[43] *See also Rowe v. Town of North Hampton*, 553 A.2d 1331, 1335 (N.H. 1989) ("no taking occurs where the public policy advanced by a regulation is particularly important and the landowner's action would substantially change the essential natural character of the land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others") (internal quotations omitted). But linking the effects of a particular flood event to a particular encroachment on wetlands is nearly impossible. The very purpose of many of the nation's complex regulatory programs is to deal with widespread public harms that are difficult to address fairly and efficiently through private litigation. An interpretation of the Fifth Amendment that would recognize only those harm-prevention measures already recognized at common law would bind government in an archaic straitjacket.

Lastly, reliance on the common law of nuisance to determine when the government can justifiably act to prevent public harm without paying compensation would

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[42] Food and Drug Administration, *Chemical Carcinogens: A Review of the Science and its Associated Principles*, 50 Fed. Reg. 10,372, 10,379 (1985).

[43] U.S. Environmental Protection Agency, *America's Wetlands: Our Vital Link Between Land and Water* 4 (Feb. 1988).

embroil the courts in difficult policy judgments that the legislative branch should make in the first instance. Modern resource and land use management programs often involve complex relationships to which the essentially ad hoc, site-specific nature of nuisance law is ill-suited. As the Court stated in *City of Milwaukee*, 451 U.S. at 325:

> The invocation of federal common law. . . is particularly inappropriate in areas as complex as water pollution control. As the District Court noted: "It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. . . ." Not only are the technical problems difficult . . . . but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution as being "sporadic" and "ad hoc," apt characterizations of any judicial approach applying federal common law.

See also Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1976).

Contrary to the view of the United States, tying government authority to prevent public harms to nuisance doctrine is not necessary to avoid evisceration of the Fifth Amendment. As the South Carolina Supreme Court explicitly recognized in this case, it is not sufficient under the Fifth Amendment that a regulation was enacted to serve the general public welfare. The "public use" requirement in the takings clause of the Fifth Amendment requires that the government act for a "public" purpose, whether or not compensation is paid. The power of government to enforce regulations without payment of compensation is necessarily based on a narrower foundation.

Not every harmful external effect of property use will support restrictions that severely limit potential uses of the property. A claimant might support a takings claim by demonstrating that the harms caused by the proposed use of the property, individually and in combination with other

activities, are too trivial or insignificant to support the restriction. Moreover, while the courts owe substantial deference to legislative judgments, they could perhaps review the background and character of a harm-prevention regulation to ensure that the harms that the regulation addresses are not mere pretext. *Compare First English*, 482 U.S. at 327 (Stevens, J., dissenting on other grounds) (claimant must "allege some sort of improper purpose or insufficient justification in order to state a colorable federal claim for relief").

IV. PETITIONER FAILED TO CARRY HIS BURDEN OF DEMONSTRATING A TAKING IN THIS CASE.

If the record in this case addressed all of the relevant considerations, amici are confident that the Court would conclude that the South Carolina setback requirement does not effect a taking in violation of the Fifth Amendment. The public dangers of development on the ocean shore are both real and significant. Moreover, it is plain from the discussion in Section I of this Brief and the history of the Beachfront Management Act that the South Carolina Legislature was genuinely and properly concerned about the public harms caused by development adjacent to eroding ocean shorelines.

However, the Court need not reach these issues because it should affirm the decision of the South Carolina Supreme Court on the narrower ground that petitioner failed even to attempt to establish the necessary elements of a taking. Petitioner did, of course, introduce evidence concerning the economic effect of the regulation on him. But, for the reasons discussed above, petitioner was required to address not only the harm to himself but also the harm to the public the setback requirement is intended to avoid. Because petitioner failed to address the latter part of the equation, his claim fails as a matter of law.

While certain amici assert, without explanation, that the Council should bear the burden of justifying the setback requirement, that assertion is plainly wrong. The Court has only recently reaffirmed that the claimant bears the

burden in a takings challenge. *See Keystone*, 480 U.S. at 485 (application of Court's takings analysis "demonstrates that [claimants] have not satisfied *their* burden of showing that the Subsidence Act constitutes a taking") (emphasis added). *See also Goldblatt*, 369 U.S. at 596 ("Our past cases leave no doubt that appellants had the burden on 'reasonableness.' ") As discussed above, *see* page 19, the character or purpose of a governmental action is not a type of defense but rather "is a critical factor in determining whether a taking has occurred" in the first place. *Keystone*, 480 U.S. at 488 (citing *Penn Central*). Because the Fifth Amendment provides no protection for uses of private property that are harmful to others, a person who has been prohibited from engaging in such an activity cannot complain that he has been denied any right protected by the Amendment. Accordingly, in order to demonstrate that his property was taken, petitioner had to at least address whether the coastal setback requirement was a reasonable measure designed to safeguard public safety and prevent other public harms.

Finally, assigning the burden of proof to the claimant is consistent with the usual presumption in favor of the constitutionality of legislative acts, a presumption that applies to takings claims. *See Goldblatt*, 369 U.S. at 594 (citing "the usual presumption of constitutionality" that applies to statues attacked under the Fifth Amendment); *see also First English*, 482 U.S. at 327 (Stevens, J., dissenting on other grounds) ("the strong presumption of constitutionality that applies to legislative enactments certainly requires one challenging the constitutionality of an ordinance" to demonstrate that it is not a valid harm-prevention measure).

In this case, petitioner did not even attempt to demonstrate that the setback requirement is not a valid measure to prevent harm to others and the public. Petitioner did not challenge the Legislature's conclusions that coastal erosion was a serious problem, that additional development along the shore exacerbated risks to life and property, and that the setback requirement was a reasonable and proportioned response to the problem. Furthermore, petitioner did not challenge the methodology for establishing the setback line in the Beachfront Management Act. While the Act provided for use of a different baseline whenever it could be demonstrated that "the shoreline is unlikely to return to its former position," petitioner never bothered to suggest to the Coastal Council that the setback line affecting his property should be set at a different point.

The only evidence introduced by petitioner remotely related to the reasonableness of the legislative objectives was that the Isle of Palms was generally accretional, that some development had taken place on lots adjacent to petitioner's property, and that at present there is an extensive beach area in front of petitioner's property. This evidence simply did not address the threat posed by long-term sea-level rise, the unpredictability of erosion along the shoreline, and the need for the margin of safety provided by the Act to protect against major storms. And in view of the fact that the Act explicitly provided for adjustment of the baseline, and the fact that petitioner failed to avail himself of that opportunity, petitioner is barred from arguing in this case that location of the setback was unreasonable as applied to him.

Based on the record presented to the trial court, the South Carolina Supreme Court was entitled to rely on the legislative findings in the Act to conclude that the Act was a "reasonable" and "proportionate" response to a "serious" public harm. Cert. Pet. App. at 13. Contrary to the view of petitioner, the court's decision does not reflect blanket acceptance of the legislative judgment. Nor did the court suggest that any legitimate police power regulation would not constitute a taking. It expressed no unwillingness to examine the Legislature's factual findings, but noted only that petitioner had failed to challenge them. Absent any effort by petitioner to even address the findings in the Act or the methodology the Legislature selected, the court properly concluded that petitioner failed to demonstrate a taking in this case.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to remand the case to allow petitioner to exhaust his administrative remedies or, in the alternative, to affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

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APPENDIX

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Nueces County is a subdivision of the State of Texas located on the Texas Gulf coast. There are 21.5 miles of barrier island beaches within Nueces County located on Mustang and North Padre Islands. In 1973, Nueces County exercised the local option under the Texas Dune Protection Act (Texas Natural Resources Codes, Section 63) and established a dune protection line located 1,000 feet landward of the mean high tide line. Under the terms of the Dune Protection Act all activities which "lowered the elevation below the 100 year flood elevation, or affected vegetation" were required to receive a permit from the Commissioners' Court. As a matter of policy, the Nueces County Commissioners' Court has declined to issue permits for structures located on the main dune line, and has instead encouraged applicants to locate their construction landwarrd of the principal dune line. The Texas General Land Office has supported this position in critical dune areas. To date all applicants have complied with this practice.

The Scituate Conservation Commission, under State Statute (General Laws, Chapter 131, section 40) and the Town of Scituate Code of Bylaws (Chapter 19, Code of Bylaws), is charged with reviewing all projects which have the potential to alter resource areas protected by these regulations within the Town of Scituate, Massachusetts. These projects include many in the coastal area which are in active erosion zones, most particularly barrier beaches. The coastline in Scituate includes 10 designated barrier beaches, three of which are federally designated and two of which are designated habitat areas. These coastal landforms are subject to severe erosion and extensive damage during large storm events. Those that are developed are subject to overwash conditions which make roads impassable due to flooding, sediment deposit, and transport of debris.

The Conservation Commission of Chatham, Massachusetts is mandated by state law (General Laws, Chapter

131, section 40) and the Chatham Wetlands Protection Bylaw to administer wetlands protection programs, including development permits. As a coastal community with 7300 parcels of land and approximately 9000 residents, the Commission is concerned about erosion damage and public expense resulting from storms, flooding, and excessive building.

The American Littoral Society was founded in 1961 with the goal of encouraging the study and conservation of marine life and its habitat in the coastal zone. The Society has about 9000 members, residing in all coastal states. Among the issues of special interest to the Society and its members are: coastal land use as it affects habitat and water quality, beach access, and living marine resources. The Society has six regional offices, in addition to headquarters at Sandy Hook, Highlands, New Jersey and a professional staff of 10.

The Chesapeake Bay Foundation is a non-profit environmental organization dedicated to the restoration and protection of the Chesapeake Bay and its tributaries. Incorporated in the state of Maryland, it has offices in Maryland, Virginia and Pennsylvania, and over 83,000 members in all fifty states and twelve foreign countries. Chesapeake Bay is the largest estuary in the United States and biologically one of the most productive systems in the world. More than 2,700 species of plants and animals inhabit the Chesapeake and its shoreline. The Bay watershed, or drainage basin, contains over 64,000 square miles in six states, and includes over a million acres of wetlands which are critical to the health of the Bay. The value of the Bay to the economies of nearby states is estimated to be in the billions of dollars. In addition, the Bay region is home to over 13 million people, with an additional several million expected in the next ten to fifteen years.

The Coast Alliance is a national non-profit public interest group dedicated to raising public awareness about our priceless coastal resources. Composed of concerned activists across the United States, the Coast Alliance provides

information on activities affecting the nation's coasts. Over the years, the Alliance has sought to increase public understanding of the risks that unwise shoreline development poses to the environment, public safety and the federal Treasury. The Alliance has published reports, articles and books on the topic, and continues to work to educate citizens, lawmakers and government officials about the need to protect humans, tax dollars and the coastal ecosystem from development in hazardous areas along the coasts.

The Environmental Defense Fund, Inc. (EDF) is incorporated as a non-profit corporation under the laws of New York. EDF is a national environmental advocacy organization staffed by scientists, economists and lawyers, with more than 200,000 members. Founded by university scientists in 1970 because of their concern with the pesticide DDT, EDF's environmental efforts have included the protection of America's coastal waters for more than twenty years. EDF has worked to minimize threats to property and human life on coastal barrier islands and to preserve their ecology by allowing the natural process of erosion and accretion to take place. Its staff and Board members have served on numerous advisory committees to the Environmental Protection Agency, the National Academy of Sciences, the Army Corps of Engineers and state and local agencies. They have played instrumental roles in shaping federal and state environmental policies that frequently involve limitations on profitable uses of property when necessary to protect against serious public harm.

The National Audubon Society (Audubon) is a nonprofit, national conservation organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 500 local chapters. The mission of Audubon is to effect wise public policy for the environment, especially in major issues that bear on wildlife and wildlife habitat. Audubon plays an active role in a variety of issues that could be significantly affected by the outcome of this case, including wise use of rivers and water resources, conservation of wetlands, and protection of endangered species.

Natural Resources Defense Council (NRDC) is a non-profit membership organization dedicated to protecting our nation's natural resources. NRDC has offices in New York, Washington, D.C., San Francisco, Los Angeles, and Honolulu. NRDC has worked for over 15 years for the protection of coastal areas and has played an active role in the enactment and implementation of federal and state legislation designed to protect the coast, including the Coastal Zone Management Act and the Coastal Barrier Resources Act. NRDC has over 100,000 members nationwide.

The National Wildlife Federation is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the natural resources of the world. Since 1980, National Wildlife Federation has been working at the national, regional, and local level to encourage the protection and preservation of fragile coastal and marine ecosystems through sensible land use management practices.

The South Carolina Wildlife Federation (Federation) is a membership organization dedicated to the wise use and conservation of natural resources. An affiliate of the National Wildlife Federation, the Federation is headquartered in Columbia, South Carolina and has approximately 7,000 members. The Federation has been active in South Carolina's coastal management process, participating in the promulgation of Coastal Council regulations, commenting on permit applications, and exercising other opportunities for public input into the regulatory process.

Dr. Joseph F. Donoghue is an Associate Professor of geology at Florida State University and director of the Sedimentologic Research Lab. His research encompasses coastal and barrier island processes, long-term and short-term response of coastal features to sea level rise, the effects of storms, and the marine geology of the continental margin. This research has been funded by numerous federal and state agencies. He has an extensive list of journal publications and technical reports on coastal geologic subjects.

Dr. Paul T. Gayes serves as Director of the Center of Marine and Wetland Studies at University of South Carolina-Coastal Carolina College and has been actively engaged in coastal geological studies. He is a member of the U.S. Working Group to the International Geologic Correlation Programe-Project 274; Quaternary Coastal Evolution and has published on relative sea level and coastal change.

Dr. Joseph T. Kelly is the Director of the Marine Geology Division of the Maine Geological Survey and an Adjunct Professor of Geology at the University of Maine. Dr. Kelly participated in drafting Maine's sand dune regulations, which preclude rebuilding following storm destruction or development in high hazard areas along the coast. Dr. Kelly has a Ph.D. in Geology from Lehigh University and has worked on issues relating to sediment transport in the coastal area for his entire professional career.

Dr. Orrin Pilkey is James B. Duke Professor of Geology at Duke University, Durham, NC and Director of the Duke University Program for the Study of Developed Shorelines. He has published more than 100 research papers and is co-author of *The Beaches are Moving: the Drowning of America's Shoreline*. He has also co-edited and co-authored 16 books in the Duke University Press "Living with the Shoreline" series about the coasts of various states including South Carolina.

Dr. Rutherford H. Platt is Professor of Geography and Planning Law at the University of Massachusetts, in Amherst and a member of the Illinois Bar. He has extensively worked with legal problems of coastal, floodplain, and wetland management and is the author of many books and articles on those topics. In particular, he is the author of a new text entitled *Land Use Control: Geography, Law and Public Policy* (Prentice-Hall, 1991) and a cover article in the November, 1991 issue of *Environment* on coastal erosion (Platt, Beatley, and Miller, "The Folly at Folly Beach and Other Failings of U.S. Coastal Erosion Policy").

Dr. Stan Riggs has been Professor of Geology since 1967 at East Carolina University (ECU) in Greenville, North Carolina, where he helped start the ECU Department of Geology and founded the Institute of Coastal Marine Resources. His broad-based research has focused on coastal and estuarine systems in North and South Carolina.